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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

NO. 815

JAY E. DARLINGTON,
Petitioner,

vs.

STUDEBAKER-PACKARD CORPORATION,
Respondent.

BRIEF IN OPPOSITION OF PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals For the Seventh Circuit

WAYNE B. EASTON
Studebaker-Packard Corporation
635 South Main Street
South Bend, Indiana
Attorney for Respondent

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To The Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

The above named Respondent respectfully contends and urges that the Petition for Writ of Certiorari be denied for reasons given hereinbelow.

STATEMENT OF FACTS

Petitioner-plaintiff's action was for patent infringement brought on a design patent. The design patent does not require consideration here on the merits because plaintiff-petitioner's action was dismissed in the District Court before trial for failure of prosecution. The dismissal was

affirmed on appeal to the Court of Appeals and plaintiff-petitioner's Petition for Writ of Certiorari is limited to matters relating to the dismissal brought about by his failure to prosecute his case.

The pertinent facts of the case can be shown very nicely in outline form, with emphasis on the sequence of the action taken, and such an outline is set forth below in lieu of stating the facts in narrative form:

12-31-52 Complaint filed (Rec. App. 1a-2a)

2-20-53 Answer filed (Rec. App. 3a-8a)

No affirmative or positive action by plaintiff-petitioner for more than 4 years between the time the complaint was filed and the action was dismissed for failure of prosecution.

5- 2-57 Notice by clerk of District Court under Local Rule 11 (Petition, p. 4) of that court that cause would be dismissed 6-6-57 unless for good cause shown the court orders otherwise (Rec. App. 36a).

Plaintiff-petitioner made no response to this notice issued under Local Rule 11.

6- 6-57 Order signed by the Honorable W. Lynn Parkinson dismissing the action for failure of prosecution (Rec. App. 37a).

6-21-57 "Motion to Vacate Dismissal" by plaintiff-petitioner. Contains (1) excuses for his failure to respond to the 5-2-57 notice under Local Rule 11 and (2) excuses for his failure to prosecute his case.

Sept. 1957 The Honorable Robert A. Grant appointed judge of District Court for Northern District of Indiana (Pet. App. 6a).

3-14-58 Oral argument on "Motion to Vacate Dismissal" before Judge Grant at which plaintiff-petitioner raised question of validity of Local Rule 11 for first time. Plaintiff-petitioner given opportunity to file memorandum of authorities on his "Motion to Vacate Dismissal" (Rec. App. 41a).

4-14-58 "Plaintiff's Verified Motion for the Judge to Disqualify Himself" based on allegations that Judge Grant was previously employed by defendant-respondent in connection with the procurement or negotiation of government contracts for defendant-respondent to supply motor vehicles and other equipment to the United States Government (Rec. App. 42a-45a).

4-26-58 Defendant-respondent admits in a memorandum brief that Judge Grant was retained by it from July 1950 to the end of 1954 for matters not connected to the present case (Rec. App. 47a-50a).

5- 8-58 Order by Judge Grant denying motion that judge should disqualify himself (Rec. App. 50a).

5- 9-58 Order by Judge Grant denying the "Motion to Vacate Dismissal" for the reasons (1) plaintiff asserted only frivolous reasons for having completely ignored the May 2, 1957 notice issued pursuant to Local Rule 11 and (2) plaintiff failed to prosecute his action with reasonable diligence and had asserted only frivolous reasons for not having prosecuted his suit (Rec. App. 51a).

6- 7-58 Plaintiff-petitioner appealed the 5-8-58 and 5-9-58 orders to the Court of Appeals (Rec. App. 52a).

1- 2-59 The Court of Appeals affirmed the two orders appealed from (Pet. App. 1a-7a).

QUESTIONS PRESENTED FOR REVIEW

Plaintiff-petitioner has presented three questions for review which are as follows:

I. The issue of the validity of Local Rule 11 under which his case was dismissed for failure of prosecution.

II. The issue of whether plaintiff-petitioner's excuses for his failure to file a timely response to the clerk's notice pursuant to Local Rule 11 were sufficient under Federal Rule of Civil Procedure 60(b) to warrant vacating the dismissal order.

III. The issue of the denial of plaintiff-petitioner's motion for the disqualification of the judge.

There is a very important question which plaintiff-petitioner did not present for review:

IV. The issue whether plaintiff-petitioner's excuses for failing to prosecute his case set forth in his "Motion to Vacate the Dismissal" were sufficient to warrant vacating the dismissal order to give him the opportunity to begin prosecuting his case.

Issue IV was decided in favor of defendant-respondent in the District Court Order dated May 9, 1958 which was affirmed by the Court of Appeals. The reason for bringing this up is that plaintiff-petitioner has conceded Issue IV by not presenting it as a question for review and this concession automatically makes Issues I and II moot questions. Any action by this Court on Issues I and II favorable to plaintiff-petitioner could not be of any benefit to him because his case would still stand dismissed by reason of Issue IV having been decided in favor of defendant-respondent by the District Court and the Court of Appeals.

ARGUMENT

Issue I—Validity of Local Rule 11

Plaintiff-petitioner has challenged the validity of Rule 11 (Petition, p. 4) of the District Court. Local Rule 11 pertains to the matter of dismissing cases where there is a failure of prosecution and the test of its validity is whether the District Court has the power and authority to adopt the rule. As the Court of Appeals has affirmed the validity of Local Rule 11, the question presented for this Court is whether the adoption of Local Rule 11 represents a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision under Supreme Court Rule 19.

Plaintiff-petitioner's reasons for urging the invalidity of Local Rule 11 may be summarized by the following two points:

(1) That Local Rule 11 is inconsistent with Rule 41(b) of the Rules of Civil Procedure and that Rule 83 of the Rules of Civil Procedure prohibits such inconsistency.

(2) That Local Rule 11 makes it possible for a case to be dismissed in an automatic manner without personal attention being given the merits and contents of the case by the court.

With regard to the first contention, a case directly in point is *Hicks* v. *Bekins Moving & Storage Co.*, CCA 9, 115 F.2d 406, 408, 409. Local Rule 48 of the district court in that case is quoted on page 407 and reads, in part, as follows:

"Provided further, that all cases which have been pending in this Court for more than one year without any proceeding of record having been taken may be dismissed by the Court on its own motion for want of

prosecution, at the call of the calendar at the beginning of each term."

The clerk in the Hicks case notified counsel for plaintiff that the case would be called for dismissal for want of prosecution under Local Rule 48 and, no one appearing, an order of dismissal was entered. On appeal, after a motion to vacate the dismissal was denied, a specific issue was whether the lower court had power to enter an order of dismissal on its own motion under Local Rule 48 in that case for plaintiff's failure to prosecute his case. In discussing FRCP 41(b) the court states on page 408:

> "This rule does not specifically provide that a court may dismiss, of its own motion, for failure to prosecute, but apparently does not limit dismissals to those instances enumerated therein for it says 'any dismissal not provided for in this rule,***.'"

The appeal court then concluded on page 408 that under FRCP Rule 83 (which provides that each district court may make rules governing its practice not inconsistent with the Rules of Civil Procedure) a district court has the power to provide for dismissal of causes for lack of prosecution by the court of its own motion.

The Hicks case on page 408 thereof contains the following quotation and discussion on the point in question:

> "Mr. George Longsdorf, in his Cyclopedia of Federal Procedure, vol. 5, Sec. 1506, p. 80, says that: 'It is the settled rule in the federal courts that an action at law may be dismissed for want of prosecution or other delay fatal to the continuance of the action. Dismissal on such ground is discretionary with the courts, and within their inherent power, independent of statute or rule. In many of the districts, however, the matter is regulated by local rules, or general or standing orders applying to all cases in which no action has

been taken for a specified period.' The same thought is expressed in 18 C.J. Sec. 110, pp. 1191, 1192; and in 17 Am. Jur. Sec. 57, p. 88 * * *. The statements of the text writers are, of course, drawn from the decisions of the courts. The District Court of the United States for the District of Colorado had a rule similar to that of the court below providing for dismissal for want of prosecution and entered an order of dismissal pursuant to the rule. An appeal followed and the Circuit Court of Appeals for the Eighth Circuit said: 'this is a very proper rule, but in the absence of such a rule, every court has the power to dismiss a cause for want of prosecution. It is a matter of judicial discretion, and is frequently exercised.' * * * This power to dismiss for want of prosecution may be exercised by the court of its own motion, though no action to secure such result be taken by the defendant."

The Hicks case is cited with approval in several later cases which are not referred to herein. Many other cases could also be cited which hold that a court has the inherent power to dismiss a case for failure to prosecute on its own motion but is not considered necessary, especially since plaintiff has not cited any cases in which this question was in issue to support his position.

Plaintiff-petitioner cites *Hackner* v. *Guaranty Trust Co. of New York*, CCA 2, 117 F.2d 95, to support his position that Local Rule 11 is invalid and that a case can be dismissed for failure of prosecution only pursuant to a motion by defendant under FRCP 41(b). The Hackner case involves the specific question of whether an action should be dismissed where there is insufficiency of the service of process after a complaint is filed and not the question of the validity of a local rule utilized to dismiss a case for failure to prosecute. Plaintiff-petitioner relies heavily on a loosely worded remark in the case that an action once commenced by the filing of a complaint remains pending until dismissed

by the court under Rule 41(b) for lack in diligence in prosecution. This is only dicta because the matter of the different modes for dismissing a case for failure to prosecute was not involved in the Hackner case. The court in that case ruled in effect that it was error for the district court to dismiss plaintiff's action on the grounds that the service of process after the complaint was insufficient. In connection with this ruling the court made the broad remarks that an action remains pending after the complaint is filed until dismissed under Rule 41(b) but it is clear that this was too broad a statement for the point the court was making. The point the court was making was that plaintiff's case should not have been dismissed on the grounds that the service of process was insufficient and this could have been stated positively instead of with the overly broad negative statement made by the court.

Plaintiff-petitioner also cites *Messinger* v. *United States*, CCA 2, 231 F.2d 328 as supporting his position that only FRCP 41(b) can be utilized to dismiss a case for failure of prosecution. The Messinger case also includes loosely worded remarks to the effect that an action remains pending until dismissed for failure of prosecution under FRCP 41(b). These remarks, while not accurate, were directed to the specific matter of the service of process after the complaint is filed. The remarks are necessarily dicta because in the Messinger case the action was in fact dismissed pursuant to a motion by defendant under Rule 41(b) and thus the question of whether plaintiff's cause could be dismissed in any other manner, such as on the motion of the court based on its inherent power to dismiss a case for failure of prosecution, was not an issue in the case.

With regard to plaintiff-petitioner's second contention, that Local Rule 11 permits a case to be dismissed in an

automatic manner, it is believed that such contention is completely without merit. Defendant-respondent contends that this criticism is not valid because the rule provides a plaintiff with the opportunity to show cause within thirty days why a case shouldn't be dismissed. If a plaintiff responds by presenting reasons why he hasn't prosecuted his case he is given the personal attention of the judge which the plaintiff in this case believes is so important, and rightly so. The device of permitting a plaintiff to show cause why his case shouldn't be dismissed for failure of prosecution certainly safeguards the rights of a plaintiff and his case will not be dismissed "automatically" if he responds to the show cause notice.

It is settled law in the federal courts that courts have the inherent power to dismiss cases for failure of prosecution independently of statutes or rules and that rules, such as Local Rule 11, may be adopted for implementing and administrating this inherent power. There is thus no grounds for the exercise of this Court's supervisory power on this issue pursuant to Supreme Court Rule 19.

Issue II—Failure of Plaintiff to Respond to Notice Sent Under Local Rule 11

Plaintiff-petitioner filed his complaint December 31, 1952 and thereafter took no action whatsoever for a period of four and one-half years to prosecute his case other than a single instance in April 1956 when he filed responses to defendant-respondent's requests for admissions and interrogatories. The case was finally dismissed on June 6, 1957 for failure of prosecution.

The dismissal was pursuant to District Court Rule 11 (see Petition, page 4, for text) which provides for the dismissal of cases in which no action is taken for more than a year. Rule 11 was implemented with a notice (Rec. App.

37a) dated May 2, 1957 and signed by the Clerk to the effect that the cause would be dismissed on June 6, 1957 unless for good cause shown the court orders otherwise. Plaintiff-petitioner ignored and made no response to the May 2, 1957 show cause notice and the case was subsequently dismissed by an Order (Rec. App. 37a) signed by the Honorable W. Lynn Parkinson (then District Judge and since appointed to Court of Appeals) dated June 6, 1957.

A motion (Rec. App. 38a) by plaintiff-petitioner to vacate the dismissal filed June 21, 1957, presumably pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, alleges that the dismissal occurred because of "mistake, accident and excuseable neglect." The motion shows that it is undisputed that plaintiff-petitioner received the show cause notice and that his only excuse for not responding to it were reasons to the effect that he "overlooked" the requirement to take action and "if it had not escaped his attention" it would not have been possible to take action in the time allowed due to a heavy and continuous burden of trial work for his clients, plaintiff-petitioner being a practicing attorney in Hammond, Indiana.

One of plaintiff-petitioner's reasons, identified as (1)(b) on page 2 of petition, for urging that a writ of certiorari be granted is that it was an abuse of discretion for the District Court to deny his motion pursuant to FRCP 60(b) to vacate the dismissal. In order to prevail on this point plaintiff-petitioner has the burden of showing, pursuant to Supreme Court Rule 19, that the Court of Appeals has sanctioned such a departure from the accepted and usual course of judicial proceedings by the District Court in denying said motion as to call for an exercise of this Court's power of supervision. In order to determine whether the District Court's order denying the motion was a departure

from the accepted and usual course of judicial proceedings it appears necessary to compare the showing of "excuseable neglect" set forth in the "Motion to Vacate Dismissal" to what was actually required in prior cases which established precedents which District Courts must look to for guidance.

The cases decided under Rule 60(b) hold that very special circumstances are required to be shown to relieve a party from a judgment or an order entered as a result of failure of a party to take action required by a court such as response to a notice to show cause why a case shouldn't be dismissed due to lack of prosecution.

If inadvertence is relied on, the cases hold that relief should be denied on the ground of inadvertence unless excuseable neglect is shown. *Ledwith* v. *Storkan*, D.C.Neb., 2 F.R.D. 539, 542-545. In the *Ledwith* case a default judgement was entered against the defendant Storkan because of failure to file an answer to the complaint. The defendant Storkan sought relief under Rule 60(b) on the basis of "excuseable neglect" stating that the complaint had been turned over to an attorney and the attorney negligently failed to take any action. In denying the relief requested the court sets forth a comprehensive résumé of what constitutes "excuseable neglect" under Rule 60(b).

The court stated that Rule 60(b) is supposed to have its source in a comparable provision in the California code and makes reference to the following situations which were held not to constitute "excuseable neglect":

1. That the pressure of other business, the distracting intervention of Sunday, and the confusion of a pleading among papers in an attorney's office are inadequate to show excuseable neglect.

2. The preparation of an answer and the failure to file it under the mistaken impression that it was filed is

not such inadvertence or excuseable neglect as will support relief from the consequences of failure to make the filing.

3. The negligence of a defendant was not excuseable who had requested his business partner to attend to his defense of a suit after which he forgot about the suit until after he had suffered a default judgment to be entered.

4. That an attorney employed by the party, on receiving a cross complaint, delivered it to his stenographer with instructions only to place it in the office files but took no further step respecting answer, whereupon his client was defaulted.

5. That "excuseable neglect" was not shown by the fact that counsel was under unusual pressure of work, and that his health was poor, though not bad enough wholly to preclude him from attending to any business.

6. That a showing that one of the attorneys for the defaulted party prepared an amended complaint during a period of illness of the stenographer of an associate attorney and mistakenly thought it had been transmitted by mail for filing, when in fact the stenographer's illness had prevented such mailing, was inadequate to disclose excuseable neglect.

The court in the *Ledwith* case, pages 544 and 545 thereof, made the following comments with regard to the above six illustrations concerning the requirements for a showing of excuseable neglect:

"Citations to like effect (refers to 1 to 6 above) might be accumulated but the effort would serve no practical purpose. Save in those cases where the court has granted its indulgence without real study, and as if the vacation of the judgment were virtually an arbitrarily demandable right of the delinquent party, there is no practical difference of opinion upon the point that neglect or inadvertence resulting in default will not

alone justify the vacation of the ensuing judgment. The neglect or inadvertence must be excuseable, and real and practical grounds for excuse must be factually shown in support of the motion. • • •

Precisely what circumstances will avail to render the neglect of a counsel excuseable may not be adequately set down. But some measure of excusability may be gotten from decisions where relief has been granted. They include (a) continuous preoccupation with the trial of a distracting first degree murder case, (b) reliance on assurance by the court or a clerk thereof or opposing counsel as to the time of a trial, (a) failure to reach the place of trial in consequence of casualties in traffic, (d) sudden illness of counsel, (d) unanticipated summons to the bedside of a dying relative, and other like incidents. In each instance there was inadvertence or neglect which intercepted the timely performance of a required act, but there was likewise some disturbing and distracting event which rendered the error excusable. • • •

But the admonition towards indulgence in the exercise of an allowable discretion must not betray the court into a meddling manifestation of assumed discretion in circumstances which, under the rules, do not bring discretion into operation. Much less should it be resorted to in support of an indefensibly sympathetic appraisal of an attempted showing of "inadvertance or excuseable neglect". If the showing be inadequate to fairly establish such "inadvertance or excuseable neglect", the simple, even if sometimes unpleasant, duty of the court is to find accordingly and deny the relief sought."

Plaintiff-petitioner in the present case does not deny that he was aware of the notice to show cause but only states vaguely that he "overlooked the requirement of taking action." He must therefore be charged with being aware of the notice and, being himself a lawyer with substantial experience in the federal courts, is also chargeable with

knowing the consequences of ignoring a notice to show cause. From the statements in plaintiff-petitioner's motion to vacate the dismissal it is clear that he made a free, calculated, deliberate choice to ignore the notice to show cause. Free, calculated, deliberate choices are not to be relieved from under the rule governing relief from judgment or order. *Ackerman* v. *U. S.*, Tex. 1950, 71 S.Ct. 209, 211; 340 U.S. 193, 197; 95 L.Ed. 207. As plaintiff-petitioner in effect admitted that he made a free, calculated, deliberate choice not to respond to the notice to show cause, he is thus precluded from showing "excuseable neglect" as a reason for vacating the dismissal order. There are many cases decided under Rule 60(b) which turn on whether a showing of "excuseable neglect" is made out. All of these cases hold in effect that the neglect must be due to very special circumstances which understandably excuse the omission of a required action and do not include carelessness or inattention to one's affairs. *Fischer* v. *Dover S.S. Co.*, CCA 2, 218 F.2d 682, 683; *Ken-Mar AirPack, Inc.* v. *Toth Aircraft and Accessories Company*, D.C.Mo. 12 F.R.D. 399, 400; *United States* v. *Klapprott*, DC.N.J., 9 F.R.D. 282, 288; *Italian Cook Oil Corp.* v. *Charles A. Krause Mill Co.*, D.C.Pa., 10 F.R.D. 510, 511.

Another case held that it was an abuse of discretion to open or vacate a judgment where a moving party does not show legal ground therefore or does not offer any excuse for his own neglect or default. The court stated that a showing of mere carelessness or neglect does not constitute either inadvertence or excusable neglect sufficient to warrant vacation of a default judgment. *Federal Enterprises* v. *Frank Allbritton*, D.C.Mo., 16 F.R.D. 109, 112.

In view of above precedents which the District Court was required to follow, and in view of the fact that the only excuse plaintiff-petitioner had for ignoring the notice to

show cause was that he "overlooked" it and that he was busy with other litigation, the only reasonable and logical decision the District Court could arrive at is that plaintiff-petitioner had not presented any reasons of sufficient substance to make out a showing of "excuseable neglect" as required by FRCP 60(b). Certainly this decision of the District Court can in no way be judged to be a departure from the accepted and usual course of judicial proceedings and plaintiff-petitioner, who has the burden of showing such a departure under Supreme Court Rule 19 if he is to prevail, has not shown that there was such a departure.

Issue III—Disqualification of Judge

This issue concerns whether the District Court erred in its May 8, 1958 order (Rec. App. 50a) denying plaintiff-petitioner's April 14, 1958 motion (Rec. App. 42a-45a) for the Honorable Robert A. Grant to disqualify himself with regard to ruling on plaintiff-petitioner's June 21, 1957 motion (Rec. App. 38a-40a) to vacate the June 6, 1957 order (Rec. App. 37a) of the Honorable W. Lynn Parkinson dismissing the case on the grounds of failure of prosecution.

The Court of Appeals affirmed the May 8, 1958 order of the District Court and the question for this Court is whether, in view of Supreme Court Rule 19, this affirmance of the Court of Appeals sanctioned a departure of the District Court from the accepted and usual course of judicial proceedings to call for an exercise of this Court's power of supervision.

It is the position of defendant-respondent that the record shows that in view of the circumstances, the statutes involved (28 USCA 144 and 28 USCA 455, see Petition, p. 7 for text) and the precedent cases, that there was no abuse of discretion by the District Court. The burden is on plaintiff-petitioner to show that the District Court made a departure from the usual course of judicial proceedings.

Defendant-respondent relies herein mainly on the same reasons given in its memorandum brief on this point in the District Court which is reproduced in the Record Appendix (Rec. App. 47a-50a) and need not be repeated here. *Carr v. Fife*, 44 F. 713, referred to therein, was affirmed by the Supreme Court as indicated in the decision of the Court of Appeals in this case (Rec. App. 6a).

The retainer of Judge Grant by defendant-respondent for matters not connected to the present case is the basis for plaintiff-petitioner's motion for Judge Grant to disqualify himself. Set forth below is a simple outline with events listed in the order in which they occurred which is intended to show that the retainer of Judge Grant was an activity that was remote and had absolutely no connection with the present case.

6-14-49 Design patent 154,192, the patent in suit, issued to Tucker Corporation

7-1-50 *Judge Grant, then a practicing attorney in South Bend, Indiana, retained by former Studebaker Corporation for matters having no connection with the present case. (Rec. App. 47a)*

7-17-51 Design patent 154,192 purchased by plaintiff-petitioner (Rec. App. 1a)

9-7-51 Letter from plaintiff-petitioner to defendant-respondent giving notice of alleged infringement (Rec. App. 3a and 4a).

12-14-52 Design patent 154,192 expired.

12-31-52 Complaint filed (Rec. App. 1a-2a).

2-20-53 Answer filed. Defendant-respondent represented by attorneys George N. Beamer of South Bend, Indiana and John H. Dienner, Arthur C. Johnson and Edward C. Grelle of Chicago, Illinois (Rec. App. 3a-8a).

12-31-54 *Retainer of Judge Grant terminated by Studebaker-Packard Corporation (Rec. App. 47a).*

3-4-55 Studebaker-Packard Corporation substituted as defendant for predecessor Studebaker Corporation (Rec. App. 8a).

4-15-55 Undersigned attorney began employment with Studebaker-Packard Corporation.

6-6-57 Order by Judge Parkinson dismissing case for failure of prosecution. (Rec. App. 37a)

Sept. 1957 Judge Grant appointed as judge in District Court for Northern District of Indiana. (Pet. App. 6a)

One argument of plaintiff-petitioner appears at page 23 of the Petition where it is stated, with reference to the retainer, that "This apparently was not a routine legal retainer but one of confidential and important nature, as shown in plaintiff's motion." This argument appears to be of no pertinence because whether or not the retainer was of a confidential and important nature does not appear to be at all relevant to the question of whether Judge Grant was so "connected with any party—as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein," as required by 28 USC 455.

Plaintiff-petitioner further states (Petition, p. 23) that the fact that the undersigned attorney admitted that he knew nothing of the retainer corroborates the surmisal that the retainer was of a "confidential and important nature." While it is not in the record, the undersigned attorney began his employment with defendant-respondent company April 15, 1955, after the retainer was terminated, and from the fact that he knew nothing of the retainer it can be equally inferred that the retainer was of so little importance that it did not come to his attention. The undersigned attorney does not intend to be facetious but

only desires to illustrate the fallaciousness of plaintiff-petitioner's arguments.

Plaintiff-petitioner states (Petition, p. 24) that defendant-respondent could and should have filed a frank factual response to plaintiff's motion in this "unusual situation." It is believed that defendant-respondent was more than fair in volunteering information regarding the retainer, especially since it was not obligated to do so. Plaintiff-petitioner's motion for Judge Grant to disqualify himself was based on the allegation that Judge Grant was formerly employed by defendant-respondent in connection with the procurement or negotiation of government contracts in behalf of defendant-respondent and, as this was an unrelated matter and not a reason under 28 USC 455 for the disqualification of Judge Grant, the motion for discovery under Federal Rule of Civil Procedure 34 to obtain detailed information about this unrelated matter can be characterized as a "fishing expedition" and was properly denied. Regardless of the minute details of the retainer which plaintiff-petitioner might have gleaned if discovery had been allowed, the final decision as to whether or not Judge Grant was to be disqualified rests with the judge and his opinion was not subject to being changed by whether or not the details of the unrelated retainer were known to plaintiff-petitioner.

Plaintiff-petitioner's argument (Petition, pages 25 and 26) that the record raises a strong factual inference that Judge Grant did have a "peculiar, unexplained connection" with the subject matter of this action is entirely baseless. With reference to the outline of events, supra, page 16 hereof, the retainer of Judge Grant from July 1, 1950 to December 31, 1954 began 2½ years before the complaint was filed (December 31, 1952) and did not terminate until 2 years after the patent in suit expired (December 14,

1952). Judge Grant is not a patent lawyer by training and it is difficult to even imagine what "behind the scenes function" he could possibly have in the subject matter of this suit.

Plaintiff-petitioner's motion for disqualification of Judge Grant only alleges that the Judge was previously retained by defendant and, as this was admitted by defendant-respondent, there is no showing of good cause under FRCP 34 to justify a discovery order to permit plaintiff-petitioner to make a promiscuous search for some secret and unknown connection between Judge Grant and defendant-respondent which would force the Judge to disqualify himself. The doctrine plaintiff-petitioner is in effect proposing is that whenever a former client of a judge has a case before the judge, the opposing party shall have the unqualified right, without the necessity of showing good cause, to use discovery procedures to obtain information as to all the detail of the previous legal matters the judge handled for the former client. Plaintiff-petitioner has not referred to or cited any authorities which would lend support to this doctrine.

Plaintiff-petitioner cites 28 USC 144 (Petition, p. 7) having to do with the disqualification of a judge where a judge is biased or prejudiced for or against either party but plaintiff-petitioner has not presented any argument as to how this statute applies in this case. Plaintiff-petitioner's motion does not allege any such bias toward plaintiff-petitioner but only that at the March 14, 1958 hearing on the motion to vacate the dismissal plaintiff-petitioner was "convinced" that Judge Grant had a "preconceived prejudice and hostile attitude toward his case." Even if this allegation were true it would not present grounds for disqualification under either 28 USCA 144 or 28 USCA 455 because neither of these statutes are concerned with the at-

titude a judge takes toward a party's case, after the judge has reviewed it. After a judge has reviewed a case and formed some ideas regarding it, it is not an abuse of discretion to inform a party of his views at some intermediate point in the proceedings.

Plaintiff-petitioner alleges in his motion for disqualification of the judge (Rec. App. 44a) that Judge Grant stated at the March 14, 1958 hearing that he was only interested in the law question of the alleged conflict between Local Rule 11 and FRCP 41(b). It is to be noted however that pursuant to the hearing Judge Grant, in an Entry (Rec. App. 41a) dated March 14, 1958, gave plaintiff-petitioner the opportunity to file a memorandum of authorities in support of plaintiff-petitioner's motion to vacate the dismissal and there was no qualification that the memorandum be limited to the question of the alleged conflict between Local Rule 11 and FRCP 41(b).

In view of the above it is submitted that Judge Grant's refusal to disqualify himself, and the implicit denial of a discovery order, were well within the proper exercise of his discretion. It is clear that there was no departure from the accepted and usual course of judicial proceeding to call for the exercise of this Court's power of supervision under Supreme Court Rule 19.

Issue IV—Failure of Plaintiff to Prosecute His Case.

Of the questions presented for review by plaintiff-petitioner, questions 1(a) and 1(b) set forth on page 2 of the Petition correspond to Issues I and II herein.

The May 9, 1958 Order (Rec. App. 51a) of the District Court denying the motion to vacate the dismissal (Rec. App. 38a) has two prongs in that it presents two grounds for denying the motion.

One ground is that the motion to vacate the dismissal only asserted frivolous reasons why plaintiff-petitioner ignored the May 2, 1957 show cause notice (Rec. App. 36a) and thus the burden of showing "excuseable neglect" under FRCP 60(b) for not responding to the show cause notice was not met by plaintiff-petitioner.

In presenting the questions for review by this Court plaintiff-petitioner attacks the Order and the action of the District Court only from the standpoint that Local Rule 11 was invalid or, in the alternative, that the District Court abused its discretion in the application of Local Rule 11.

It is to be noted, however, that the May 9, 1958 Order was also supported by the finding and decision of the District Court that plaintiff-petitioner had failed to prosecute his action with reasonable diligence and that the motion to vacate the dismissal asserted only frivolous reasons for such failure. It is to be specifically noted that nowhere in his Petition does plaintiff-petitioner even argue that his reasons for failing to prosecute his case were sufficient to excuse his failure to prosecute his case. In fact, nowhere in the Petition is this part of the Order even challenged by the plaintiff-petitioner. The only conclusions which can be drawn are (1) the silence of plaintiff-petitioner on this point means that he concedes that the May 9, 1958 Order is supported by the finding that there was no reasonable excuse for his failure to prosecute his case and (2) the questions involved in IA and IB of the Petition (corresponding to Issues I and II herein) relating to Local Rule 11 and the application of this rule are moot.

In other words, it is the position of defendant-respondent that either one of the two grounds referred to above in the May 9, 1958 order denying the motion to vacate the dismissal is sufficient to support the order and, as plaintiff-

petitioner has only challenged the findings with respect to one of the grounds, the May 9, 1958 Order must be allowed to stand.

Although plaintiff-petitioner has chosen not to challenge or argue the finding by the District Court (as set forth in the May 9, 1958 Order) that he failed to present sufficient reasons to excuse his failure to prosecute his case, defendant-respondent believes it would be salutary to at least present a review of this aspect of the case because it is believed to be the essence of the matter before this Court.

Paragraph 2 of plaintiff-petitioner's June 20, 1957 motion (Rec. App. 38a-40a) to vacate the dismissal relates to his reasons for failing to prosecute his case and may be summarized as follows:

> a. Plaintiff's burden of other work from the commencement of the suit (December 31, 1952) until the filing of his present motion (June 20, 1957) to vacate the dismissal has delayed him from prosecuting the case.
>
> b. Prosecution of the case would require a large amount of work by plaintiff.
>
> c. Plaintiff has not considered it appropriate to present this action involving an alleged liability of many millions of dollars against the defendant during the last several years while defendant was extricating itself from financial difficulties.

Plaintiff-petitioner's case had been pending from December 31, 1952 until June 6, 1957 when it was dismissed and during that time he did not take one affirmative or positive step to prosecute it. From the time the complaint was filed defendant-respondent has considered the suit of the nuisance variety and that it was filed with no hope of recovery on the merits but only to force defendant-respond-

ent to make an unjust settlement to avoid the heavy expenses which always accompany patent litigation.

Plaintiff-petitioner states in his motion that he did not feel it was appropriate to prosecute his case during the time that defendant-respondent was extricating itself from financial difficulties. This contention by plaintiff-petitioner is inconsistent with his allegation that the burdens of his other work did not permit the time to prosecute his case.

Regarding the authority of the Court to dismiss plaintiff-petitioner's case in this instance, there are many cases which hold that a court has the inherent power to dismiss a suit on its own motion for want of prosecution. *American National Bank & Trust Co. of Chicago* v. *United States*, CADC, 142 F. 2d 571, 572; *Partridge* v. *St. Louis Joint Stock Land Bank*, CCA 8, 130 F.2d 281, 284; *Sweeney* v. *Anderson*, CCA 10, 129 F.2d 756, 758; *Hicks* v. *Bekins Moving & Storage Co.*, CCA 9, 115 F.2d 406, 409; *U. S. ex rel. Shinn* v. *State of Tenn.*, D.C.Tenn., 74 F. Supp. 635, 637.

The dismissal of a case for lack of prosecution on the court's own motion is similar in almost all respects to the dismissal of a case for lack of prosecution on a motion by defendant under Rule 41(b) of the Rules of Civil Procedure. Cases decided under Rule 41(b) are pertinent to the present case.

The only other matter which remains to be discussed herein is whether plaintiff-petitioner could have shown that he had a sufficient excuse for his failure to prosecute his case. The only excuse he alleged in his motion to vacate the dismissal is that he was continuously busy with his own client's litigation since December 31, 1952 and the present case would have required a large amount of work on his part. This excuse is without merit on its face because the obvious and simple solution would be to retain another

attorney to handle the case for him if he were too busy with other work to handle it himself. If his excuse were considered sufficient then no case would ever be dismissed for failure to prosecute because most people are busy with their own business and affairs such that the opportunity would not present itself to take time to prosecute their own law suits.

The cases examined by defendant-respondent dealing with the sufficiency of an excuse for failure to prosecute a law suit uniformly hold that a plaintiff must make a showing of adequate explanation for his delay.

In *Boling* v. *United States*, CCA 9, 231 F.2d 826, the court made the following statement:

> "The power of the trial court to dismiss a cause where the matter has become stale by virtue of inaction by plaintiff is inherent and has been crystallized by rule. Rule 41(b), Federal Rules of Civil Procedure, 28 U.S.C.A. One of the causes of congestion of the trial dockets is the failure of courts to exercise the authority vested in them thus to dispose of cases which are shaky or unfounded but which are held on the calendar for nuisance value. Since trial judges are hesitant to dismiss such causes of their own motion, for fear of injustice to some litigant, the device of placing cases in which no action has been taken for a considerable time on a docket for dismissal, absent a showing of adequate explanation for the delay, has been used. But even this palliative for the admitted evil has been of little avail, because of the hesitance mentioned above. Because of this fact, an order of dismissal for failure to prosecute will never be set aside unless there has been an abuse of discretion, and, of course, such a situation is not presumed."

In the *Boling* case the case was filed July 31, 1951 and dismissed with prejudice January 14, 1955 for failure to prosecute. In another case a dismissal after delay in prose-

cution of more than 16 months was not reversible error. *U. S.* v. *Bernstein*, CCA 5, 166 F.2d 466.

In *Russell* v. *Cunningham*, CCA 9, 233 F.2d 806, 811, the record before the district court at the time of its judgment dismissing the action with prejudice for failure to prosecute showed delay of 15 months, two continuances, and no sign that plaintiff was any nearer trial in August 1955, when case was dismissed, than in preceding April when case was last continued, or June of previous year, when pretrial order was filed and case set for trial. It was held that the district court did not abuse its discretion in entering such judgment without resorting to contentions or other facts not found in record. In other words, the delay showed by the record in that case was sufficient to warrant a dismissal for failure to prosecute without considering any excuses the plaintiff might be able to show.

The *Hicks* case, CCA 9, 115 F.2d 406, 409, has facts similar to the facts in the present case. In dismissing the appeal the court made the following statements:

> "The duty rests upon the plaintiff at every stage of the proceeding to use diligence and to expedite his case to a final determination, and unless it is made to appear that there has been a gross abuse of discretion on the part of the trial court in dismissing an action for lack of prosecution its decision will not be disturbed on appeal."

The court further stated, "It was not necessary for the defendants to show specific impairment of their defense, because the law will presume injury from unreasonable delay." See also *Messinger* v. *U. S.*, CCA 2, 231 F.2d 328, 331.

The above cases clearly hold that a plaintiff must make a substantial affirmative showing of an excuse for failure to prosecute his case to justify preventing a dismissal.

Plaintiff-petitioner's only excuses are (1) that since the commencement of the suit in 1952 until it was dismissed in 1957 he was busy with other litigation, (2) the case requires a large amount of work and (3) plaintiff did not want to prosecute the suit while defendant was extricating itself from financial difficulties. Except for the last reason, which cannot be take seriously, plaintiff's excuses are extremely weak. If he had a sincere desire to prosecute his case he certainly could have found ways to do so such as retaining an attorney to prosecute the case for him.

In view of the precedents referred to above to the effect that substantial reasons are required to excuse a plaintiff who has not taken any action to prosecute his case for a long period of time, the District Court was completely justified in finding that plaintiff-petitioner's excuses were too "frivolous" to warrant vacating the June 6, 1957 dismissal order. There thus can be no finding by this Court pursuant to Supreme Court Rule 19 that the Court of Appeals sanctioned such a departure from the accepted and usual course of judicial proceedings to call for an exercise of this Court's power of supervision. The May 9, 1958 order of the District Court denying the motion to vacate the dismissal should thus be allowed to stand regardless of what finding this Court makes with respect to question IA and IB of the Petition.

Wherefore, it is respectfully urged that in view of and for the reasons set forth herein, that this Court deny the Petition for Writ of Certiorari prayed for by plaintiff-petitioner.

WAYNE B. EASTON
Attorney for Respondent.